No. 86-830

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CELCOM COMMUNICATIONS CORPORATION OF PENNSYLVANIA,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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February 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Respondents FCC and Automatic Wide-Area Cellular Systems, Inc. ("AWACS") have skirted, not answered, the difficult questions presented in the Petition.

1. Respondents label this case undeserving of review because cellular comparative proceedings are a vanishing breed. FCC Memo at 5; AWACS Br. at 4. But the issues presented by Petitioner are *not* limited to cellular radio cases. They have scope and importance for numerous proceedings before the FCC and other agencies.

Respondents have not shown that the important administrative procedural issues identified by Petitioner are confined to cellular comparative proceedings. Nor

could they. The D.C. Circuit's "tardiness doctrine" could create chaos and condone unfairness in *any* agency case involving the decisional significance of a pending or proposed, but not-yet-consummated, transaction. There will surely be many such cases. Moreover, the D.C. Circuit's "rulemaking appeal doctrine," by precluding review of the application of agency rules, procedures and policies in later adjudicatory cases if the rules, procedures and policies were not directly appealed at the time of their adoption, is clearly applicable to a wide range of FCC and other agency proceedings. The "rulemaking appeal doctrine" could insulate arbitrary and irrational agency adjudicatory action from judicial review in the many FCC and other agency cases that apply earlier-promulgated rules, procedures and policies to an individual applicant which has not itself appealed their adoption. The Commission's cellular comparative hearing proceedings may be nearing an end, but the harm created by the D.C. Circuit's rulings will endure and be applied to other kinds of cases unless they are reviewed and reversed by this Court.

2. Respondents' contention that Petitioner was late in raising the anticompetitive issue is erroneous because Metromedia's acquisition of RBC was not a "fact" until the deal was consummated. Had Petitioner raised the anticompetitive issue on the basis of AWACS' earlier disclosure of a mere *proposed* transaction, or even on the basis of the Commission's approval of that proposal, Petitioner surely would have been rejected as being speculative and premature.[1]

Respondents argue that RBC was from the outset both a participant in the AWACS cellular venture and a dominant paging competitor. Therefore, Respondents reason, RBC's acquisition by Metromedia was not the significant event that Petitioner claims, because it merely

[1] The FCC's trial staff even opposed Petitioner's post-consummation motion to reopen as speculative and premature!

substituted Metromedia for RBC as a potentially anti-competitive collaborator with Lin, without changing the nature of the anticompetitive risks.[2] FCC Memo at 6; AWACS Br. at 6. But Respondents' argument founders on the simple fact that Lin could not have been required to collaborate closely with RBC. Only Metromedia, not RBC, had a power of negative control of the AWACS venture. By virtue of Metromedia's role as the source of all of the capital for the AWACS venture, Lin was required as a practical matter to collaborate and achieve consensus with Metromedia even though Lin held a 51 percent share. No such collaboration would have been necessary between Lin and RBC.[3]

Respondent FCC, here conceding that the *consummation* of the Metromedia-RBC deal may have "raised some new issues," nonetheless urges that it was proper to have held Petitioner untimely because provision of cellular service to the public needed to be on a fast track, and consideration of Petitioner's anticompetitive argument stood in the way of expedition. FCC Memo at 6-7.[4] The

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[2] Respondents' argument was not relied upon either by the Commission or the D.C. Circuit.

[3] No collaboration between Lin and RBC would have been necessary even if the Metromedia acquisition had never occurred. The "full role" for RBC contemplated by the AWACS agreement in the event Metromedia's acquisition was not consummated (AWACS Br. at 6-7) would not have resulted in close collaboration between Lin and RBC because Lin would still have had the controlling 51 percent interest and RBC would have had no countervailing power under the agreement similar to Metromedia's.

[4] The agency's decision relied on no such reasoning. The agency held Celcom untimely for failing to raise the anticompetitive issue in the separate proceeding to approve the RBC acquisition. Pet. App. 38a. This rationale was not the one ostensibly "affirmed" by the D.C. Circuit. Respondent FCC glosses over this problem, while Respondent AWACS disingenuously states that the D.C. Circuit "affirm[ed] the Commission's ruling that Celcom had an obligation to come forward . . . much earlier in *this* . . . expedited proceeding",

expedition argument here is laughable, for the Commission sat on Celcom's motion to reopen for more than a year. In any event, agencies may not cut corners in the interests of expedition, where, as here, such short cuts disregard matters at the heart of their statutory mandate.

Nor is there merit to Respondent FCC's assertion that this case now is moot. FCC Memo at 7. The authorities cited by Respondent FCC to show that Lin has divested itself of paging interests refer only to the *New York* market and do not concern Lin's status as a potential paging competitor in the *Philadelphia* market. *See Page Boy, Inc.*, FCC Mimeo 5432 (June 27, 1986), *cited in Celcom Communications Corp.*, FCC 86-423 at 4, n.31 (Oct. 16, 1986). In any event, the Commission's cellular comparative hearing rules forbid "one-upsmanship" in the form of upgrading amendments, *see, e.g., Cellular Systems (Reconsideration)*, 89 F.C.C.2d 58, 89 (1982), so that AWACS' anticompetitive problems could not have been cured by any divestiture after designation for hearing.[5]

3. Respondents miss the point of Petitioner's argument that the Court of Appeals erroneously refused to review the application of FCC rules, procedures and policies to Petitioner's Philadelphia application.[6] In the D.C.

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and urges the Court to accord "wide latitude" to the agency's "initial determination" of the procedural question. AWACS Br. at 8 (emphasis added). In fact, the D.C. Circuit's error is compounded because it has ignored the agency's procedural ruling and created a new one, contrary to FCC v. Schreiber, 381 U.S. 279, 290 (1965).

[5] AWACS has not claimed mootness here.

[6] Respondent AWACS mischaracterizes Petitioner's point as a complaint about the D.C. Circuit's approval of a "depart[ure]" by the FCC from its original regulatory criteria (AWACS Br. at 8). This is not Petitioner's argument. AWACS also argues that the preferences awarded to it by the FCC reflected reasoned decision-

Circuit Petitioner attacked the irrationality of the Commission's continuing to award preferences for application proposals after it had disclaimed any interest in whether applicants would actually implement their proposals. The court's response was merely the citation of the court's *Atlanta* decision.[7] Respondent FCC misconstrues Petitioner's argument before this Court by casting it as a complaint that the Court of Appeals did not address this point *at all*. FCC Memo at 8-9.

Contrary to Respondent FCC's contention, mere cita tion of the *Atlanta* case was *not* "a rejection of the argument once again on the merits." FCC Memo at 9. The *Atlanta* decision never addressed the *merits* of the challenge made to the public-interest emptiness of the comparative preferences. Instead, the Court of Appeals said in *Atlanta* merely that substantive review of the point was foreclosed because there had been no appeal of the original cellular rulemaking adopting the rules, procedures and policies that were to govern cellular comparative proceedings. Pet. App. 55a. Petitioner's point here is that the *Atlanta* decision was fundamentally wrong, so that it was also fundamentally wrong to apply it in this *Philadelphia* case. Petition at 16-25.

Respondent FCC fails to defend the *Atlanta* decision; its memorandum appears instead to assume that, because the Philadelphia case was merely an application of the *Atlanta* precedent, there is no basis for this Court's review. This attempt to short-circuit this Court's supervisory powers must fail: the Court has the power to review the Philadelphia decision *and* to pronounce unsound the *Atlanta* reasoning on which the Philadelphia

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making. Such arguments are irrelevant, given the D.C. Circuit's reliance on the *Atlanta* precedent, which pretermitted review of the rationality of the preferences.

[7] Celcom Communications Corp. of Georgia v. FCC, 787 F.2d 609 (D.C. Cir. 1986), Pet. App. 51a-64a.

decision relies. That is what Petitioner has asked the Court to do.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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